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No. 90-906

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1990

**METROPOLITAN WASHINGTON AIRPORTS AUTHORITY,
ET AL., PETITIONERS**

v.

**CITIZENS FOR THE ABATEMENT OF AIRCRAFT NOISE,
ET AL., RESPONDENTS,**

**UNITED STATES OF AMERICA,
INTERVENOR-RESPONDENT**

**ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

The Metropolitan Washington Airports Act of 1986 (49 U.S.C. App. 2451 *et seq.*) requires, as a condition of leasing federally owned airports to a regional airports authority created by the Commonwealth of Virginia and the District of Columbia, that the airports authority create and appoint a Board of Review that has veto power over major authority actions and that consists entirely of Members of Congress.

The questions presented (in the order presented in the petition) are:

1. Whether the Board of Review is constitutional.
2. Whether the challenge to the Board of Review is justiciable.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-27a) is not yet reported. The opinion of the district court (Pet. App. 29a-55a) is reported at 718 F.Supp. 974.

JURISDICTION

The judgment of the court of appeals was entered on October 26, 1990. The judgment was stayed by order of the court of appeals entered on December 6, 1990. Pet. App. 28a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Washington National and Washington Dulles International Airports are the only federally owned civilian airports in the nation. From the time they were opened until 1987, both airports were operated by the federal government. For many years before 1987, the government had considered ceding its operational control of these airports. Pet. App. 2a.

In December 1984, a federal advisory commission report suggested a long-term lease arrangement between the federal government and an independent regional airports authority. Pet. App. 2a-3a. In response, both Virginia and the District of Columbia enacted legislation authorizing creation of a regional airports authority capable of assuming operation of the two airports. *Id.* at 3a. See 1985 Va. Acts ch. 598; D.C. Regional Airports Authority Act of 1985, D.C. Law 6-67 (1985) (*reprinted at* Pet. App. 87a-106a, 119a-139a).

In 1986, Congress passed the Metropolitan Washington Airports Act of 1986 (49 U.S.C. App. 2451-2461) (the Airports Act) (*reprinted at* Pet. App. 60a-85a), which authorized the Secretary of Transportation to transfer operating authority over National and Dulles Airports to a local regional authority (the Airports Authority) under an extendable 50-year lease. In the statute, Congress recognized—among other factors—that all other major American civilian airports are operated by regional or local authorities; that the Executive Branch had recommended a transfer of authority to a local entity; and that control of National and Dulles Airports by a regional authority would facilitate timely improvements needed to meet growing demand. 49 U.S.C. App. 2451.

In the federal statute, Congress set out certain conditions that must be satisfied for the Secretary to enter into a lease of the two airports. 49 U.S.C. App. 2453(2), 2454(a) and (c), and 2456(a). The Airports Authority must have powers granted by Virginia and the District of Columbia, but must be an independent political subdivision constituted solely to operate the local airports. 49 U.S.C. App. 2456(a) and (b). The lease must require an approximately \$3 million annual payment to the United States Treasury by the Airports Authority. 49 U.S.C. App. 2454(b)(1). The Airports Authority must have a governing Board of Directors composed of members chosen by the Governors of Virginia and Maryland, the Mayor of the District of Columbia, and the President, all but one of whom must reside in the Washington, D.C., metropolitan area. 49 U.S.C. App. 2456(e).

Of particular relevance to this case, the lease must also provide that the Airports Authority Board of Directors establish a Board of Review. The Board of Review members must be appointed by the Board of Directors from lists of Members of Congress serving on specified committees of the Senate and House of Representatives, and one Member at large from either body alternately. 49 U.S.C. App. 2456(f). These lists are to be submitted to the Board of Directors by the Speaker of the House of Representatives and the President *pro tempore* of the Senate. The Board of Review is to be made up entirely of Members of Congress, but Members from Virginia, Maryland, or the District of Columbia are disqualified. 49 U.S.C. App. 2456(f)(1).

Also under the conditions set by Congress, the Airports Authority must submit various actions to the Board of Review for approval, including the Au-

thority's annual budget, issuance of bonds, adoption or repeal of regulations, and adoption or revision of any airport master plan. 49 U.S.C. App. 2456 (f)(4)(B). Any of these proposals may be implemented by the Airports Authority if not disapproved within 30 days by the Review Board. 49 U.S.C. App. 2456(f)(4)(C). If the Board of Review is barred from carrying out its functions as a result of a judicial order, the Airports Authority lacks power to take any of the actions it would otherwise be required to submit for review. 49 U.S.C. App. 2456(h).

2. In March 1987, the Secretary of Transportation entered into a lease with the Airports Authority; the lease was also signed by the Governor of Virginia and the Mayor of the District of Columbia. Pet. App. 163a-189a. The lease provided for establishment of a Board of Review, as described in the Airports Act. Pet. App. 175a-176a. The Airports Authority also adopted bylaws creating the Board of Review and giving it powers and functions consistent with the provisions in the Airports Act. Pet. App. 148a-162a.

In early April 1987, Virginia amended its prior legislation concerning the Airports Authority to provide explicit power for the Authority to establish a Board of Review. See 1987 Va. Acts ch. 665, § 5.5 (Pet. App. 111a). In June 1987, the District of Columbia similarly amended its earlier legislation to empower the Airports Authority to set up a Board of Review. See D.C. Regional Airports Authority Act of 1985 Amendment Act of 1987, D.C. Law 7-18, Act 7-32, § 3(c)(2) (Pet. App. 143a).

By September 1987, the Airports Authority had appointed the Board of Review. Pet. App. 6a. In March 1988, the Airports Authority submitted to the Board of Review a new Master Plan for National

Airport. The following month, the Board of Review voted not to disapprove it;¹ the Airports Authority has begun implementation of the Plan and has sold bonds in order to finance construction. Pet. App. 6a, 36a. The Master Plan provides for construction at National Airport which will, among other benefits, make it possible for the airport to accommodate larger and more airplanes. *Id.* at 41a. The size of the terminals and parking facilities will be significantly expanded. *Ibid.*

3. In November 1988, respondents Citizens for the Abatement of Aircraft Noise, Inc. (CAAN), *et al.* filed suit against petitioners, contending that the construction called for by the Master Plan would lead to an increase in National Airport "noise levels and safety and environmental problems" injurious to them and to CAAN's members. C.A. App. 12. Plaintiffs argued that, because the Board of Review is composed of Members of Congress, the Board's power to oversee the Airports Authority violates several constitutional provisions and the separation of powers doctrine. *Ibid.* Plaintiffs therefore sought a declaration that the Board of Review's authority under 49 U.S.C. App. 2456(f)(4) is unconstitutional and void, and an injunction preventing the Airports Authority from implementing the National Airport Master Plan. C.A. App. 13.

4. In July 1989, the district court granted summary judgment to petitioners. Pet. App. 55a. The court first ruled that the case was ripe, despite the fact that the Board of Review's veto authority had not been exercised with respect to the Master Plan. *Id.* at 37a-38a. The court also concluded that plain-

¹ The Board of Review has exercised its veto power on only one occasion—involving a matter not related to the claims here. Pet. App. 38a.

tiffs had standing because an increase in air traffic at National Airport could not occur without the improvements provided by the Master Plan. *Id.* at 39a-42a. Alternatively, the court found standing because plaintiffs' influence over decisions regarding National Airport had been diminished by the ban against local representation among the Members of Congress on the Board of Review. *Id.* at 42a-43a.

The district court then upheld the validity of the Airports Act. The court noted that the statute explicitly provides that the Board of Review members serve in their individual capacities (49 U.S.C. App. 2456(f)(1)), and that the Airports Authority can remove them. Pet. App. 46a-47a. It determined that the Board of Review is therefore not an agent of Congress for separation of powers purposes. *Id.* at 46a-50a. The district court further found that both Virginia and the District of Columbia voluntarily created the Airports Authority and entered into the lease with the federal government. *Id.* at 51a. Accordingly, the Board of Review "derives its existence from state law, not federal law." *Ibid.* The court thus concluded that, in view of the state law character of the Airports Authority and Board of Review, there was no conflict with constitutional requirements for federal offices and for the exercise of federal power. *Id.* at 51a-54a.

5. Plaintiffs appealed, and the Attorney General intervened on behalf of the United States to defend the statute. The District of Columbia Circuit reversed the judgment of the district court.

The majority first rejected the argument that the Board of Review is not exercising federal power. The court emphasized that the Virginia and District of Columbia authorizing statutes do not spell out the powers and functions of the Board of Review in detail; instead, the federal Airports Act contains spe-

cific requirements concerning the Board. Pet. App. 10a-13a, 16a-18a. The court concluded that the Board of Review carries out "significant authority pursuant to the laws of the United States" (*id.* at 10a), because the federal statute required creation of the Board of Review. *Id.* at 10a-11a.

Having determined that federal power was being exercised, the court held that "the Board of Review, as currently constituted, unconstitutionally vests executive functions in an agent of Congress" (Pet. App. 19a), because (1) the members of the Board of Review are implementing executive functions and (2) they are subject to congressional control. The court emphasized that, in its view, Congress retained removal power because it could remove the members from the pertinent congressional committees. *Id.* at 13a-18a.²

Judge Mikva dissented. He questioned the court's characterization of the Board as a federal entity and concluded that "[t]he fact that the federal Act authorizing the transfer of the airports to the Authority contemplates the Board's creation does not alter the Board's fundamental state parentage." Pet. App. 22a. Judge Mikva then concluded that, even if the entity is exercising federal power, it is not unconstitutional. *Id.* at 22a-26a. Judge Mikva also disagreed with the majority's removal analysis. He concluded that the Airports Act should be read to vest removal authority with the Board of Directors both because the appointment authority lies with that Board, and because statutes should be construed to avoid constitutional problems. *Id.* at 24a-26a.

² Despite its holding, the court also "direct[ed] * * * that actions taken by the Board to this date not be invalidated automatically on the basis of [the court's] decision." Pet. App. 19a (citing *Buckley v. Valeo*, 424 U.S. 1, 142 (1976)).

DISCUSSION

1. This case clearly warrants review. An important provision of a federal statute has been declared unconstitutional and invalidated. The case raises significant issues of separation of powers, federalism, and the character and scope of federal authority. It also has substantial practical consequences. The decision is likely to have an impact on all who use National and Dulles Airports, as well as on all who live in the surrounding areas. Moreover, large sums of money have already been spent pursuant to the current operating regime of the airports.

2. The justiciability issues raised by petitioners in their second question also merit this Court's review. Although we believe the case is justiciable, these important threshold questions are not free from difficulty and should therefore be briefed and argued by the parties.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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* The Solicitor General is disqualified in this case.